Supreme Court, U.S.
FILED
JUL 25 1995
CLERK

(2)

No. 94-2116

In The

Supreme Court of the United States

October Term, 1995

LANDSCAPE PROPERTIES, INC.,
Debtor In Possession,

Petitioner,

v.

ROBERT A. VOGEL and JOE D. WHISENHUNT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. CALHOUN, JR., Esq.*
SCOTT E. DANIEL, Esq.
HILBURN, CALHOON, HARPER, PRUNISKI & CALHOUN, LTD.
P. O. Box 5551
North Little Rock, Arkansas 72119
(501) 372-0110

Attorneys for Respondent Robert A. Vogel

*Counsel of Record

G. PATRICK ARNOULT, Esq.
RUSSELL J. HENSLEY, Esq.
THE BOGATIN LAW FIRM
860 Ridge Lake Boulevard
Suite 360
Memphis, Tennessee 38120
(901) 767-1234

Attorneys for Respondent Joe D. Whisenhunt

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

23pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 2

I. Enactment of 11 U.S.C. § 363(n) did not Eliminate Defenses 2

II. Election of Remedies is not an Issue 9

III. The Case was Properly Submitted to the Jury 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104 (1991) 8

BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994) 8

Curtis v. Loether, 415 U.S. 189 (1974) 15

Davis v. Wakelee, 156 U.S. 680 (1895) 12

Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993) 12

General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938) 17

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)... 14, 15

Grogan v. Garner, 806 F.2d 829 (8th Cir. 1986) 12

Gumport v. China Int'l Trust & Inv. Corp. (In re Intermagnetics America, Inc.), 926 F.2d 912 (9th Cir. 1991) 6

Harris Trust and Savings Bank v. E-II Holdings, Inc., 926 F.2d 636 (7th Cir. 1991), *cert. denied*, 502 U.S. 866 (1991) 12

In re Davis, 109 B.R. 633 (Bankr. D. Vt. 1989)..... 5

Landscape Properties, Inc. v. Vogel, 46 F.3d 1416 (8th Cir. 1995) 1

Ledford v. Second Nat'l Bank (In re Becker), 76 B.R. 108 (Bankr. S.D. Ohio 1986)..... 5

Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed. Cir. 1995)..... 16

TABLE OF AUTHORITIES – Continued

Page

Metsch v. Republic Nat'l Bank (In re Colombian Coffee Co., Inc.), 66 B.R. 211 (Bankr. S.D. Fla. 1986) 5

Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494 (1986) 9

Murray v. Silberstein, 882 F.2d 61 (3d Cir. 1989) 12

Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987) 12

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 10

Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.), 3 F.3d 306 (9th Cir. 1993) 6, 7

Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.), 28 F.3d 965 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 577 (1994) 7

Texas v. Mead, 465 U.S. 1041 (1984) 17

Tull v. United States, 481 U.S. 412 (1987) 16

United States v. Texas, 113 S. Ct. 1631 (1993) 8

United States v. Johnston, 268 U.S. 220 (1925) 17

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 9

United States v. Smith (In re Hagendorfer), 803 F.2d 647 (11th Cir. 1986) 6

Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946) 8

STATUTE

11 U.S.C. § 363(n) 2

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Civ. P. Rule 60 6

Sup. Ct. R. 10.1 2

OTHER AUTHORITY

Stern & Gressman, *Supreme Court Practice* § 14.4 (7th ed. 1993) 2

STATEMENT OF THE CASE

Petitioner fails to include in its Statement of the Case numerous salient aspects of this litigation. Fortunately for this record, the opinion of the Eighth Circuit Court of Appeals was required to be included in the appendix (Pet. p. 3A), and it does present the facts in appropriate context. *Landscape Properties, Inc. v. Vogel*, 46 F.3d 1416 (8th Cir. 1995).

Petitioner omits to explain, for example, the entire history of the process by which its own shareholders and the Trustee combined to establish the ultimate selling price of the subject property more than two months prior to any agreement between Respondents, a price which paid all creditors in full and yielded net proceeds to the shareholders. It omits to explain how the efforts of Vogel, in reliance upon the contract with the Trustee, created the value for which he was paid by Whisenhunt. It omits to explain that the Trustee himself prepared the deed to the property, reciting the direct conveyance to Whisenhunt's nominee by reason of the assignment from his alleged competitor.

Petitioner neglects to inform this Court that the Trustee sued only for damages, after obtaining a copy of the challenged agreement, or that the Trustee specifically waived any claim to rescind the transaction in order to distribute the Whisenhunt purchase price to the creditors, Petitioner's counsel, Petitioner's sole shareholders and to himself.

Petitioner devotes a major portion of its argument to the claim that Respondents were not entitled to a jury trial. Astonishingly, however, the Petitioner fails to

inform this Court that its counsel made, and admitted on the record, a conscious and calculated tactical decision to *agree* to a jury trial to avoid error and preserve the favorable verdict it was so confident of obtaining.

Unfortunately, moreover, the Petitioner's characterization of the legal issues presented is no more straightforward than its statement of facts.

REASONS FOR DENYING THE PETITION

This Court doubtless receives hundreds, if not thousands, of petitions each year with no more basis than failed expectations and keen disappointment. This is another one.

After one cuts through the transparent effort of Petitioner to cloak its arguments in the trappings of constitutional law and statutory construction, it is clear that this case presents no more novel issues than arguments about the sufficiency of the evidence and the exercise of discretion by the District Court in denying the Petitioner's untimely and prejudicial proposed amendment to the complaint. Such matters are not appropriate for consideration through Writ of Certiorari. Sup. Ct. R. 10.1; Stern & Gressman, *Supreme Court Practice* § 14.4 (7th ed. 1993).

I. Enactment of 11 U.S.C. § 363(n) did not Eliminate Defenses.

In 1988, Landscape Properties, Inc. was a company in bankruptcy which had, among its various assets, a piece of undeveloped real property located on the outskirts of

Little Rock, Arkansas. During the summer of 1988, the bankruptcy Trustee conducted competitive pricing among all interested parties. At the outset of the sales effort, the Trustee and the debtor set their target price at $1.2 million, which was the value sworn to by the shareholders in the Schedules filed under oath in the bankruptcy action. That was the debtor's and the Trustee's price and on September 1, 1988, Vogel executed a contract agreeing to pay it. That was the price ultimately paid to the Trustee by Whisenhunt after the Vogel Contract was assigned to him.

The jury was entitled to consider the fact that the Petitioner's sole shareholders themselves were pleased with the September 1, 1988 Contract and Vogel's commitment to pay their asking price. This was not surprising since the Petitioner's shareholders needed the money to pay the Internal Revenue Service to cover their personal liability for withholding taxes diverted by them to their own use, as well as for payment of all creditors of the company to allow retention of other real estate not involved in this sale. With the Vogel contract in hand, the Petitioner's shareholders were able to hold off the tax collector and forestall foreclosure by the mortgagee who was seeking to be paid.[1]

The Vogel Contract was the only agreement capable of being approved since any other offer would require an additional notice and hearing process of the sort that had already delayed the sale for two months. Even then, there could be another offer at the next hearing and the process

---

[1] The two shareholders of Landscape Properties, Inc. sought bankruptcy protection to avoid liability for the unpaid withholding taxes.

could continue indefinitely, thereby delaying access to the sale proceeds so badly needed by the shareholders and the Trustee. The Trustee and the Petitioner's shareholders only wanted Vogel and Whisenhunt to resolve their dispute so they could conclude this sale at the price agreed upon. They were not interested in what it took to obtain that resolution and avoided finding out anything about the arrangement.

Petitioner complains that the Respondents should not have been allowed to have the jury instructed on issues of waiver and estoppel. Those defenses were pertinent in view of the substantial evidence that the Trustee himself had ample reason to know that the Respondents had made an agreement to resolve their dispute and move the sale to a conclusion. Indeed, notwithstanding the fact that the Trustee contracted to sell this property to Vogel, the Trustee himself deeded the property to Whisenhunt's nominee by virtue of a recited assignment from Vogel. This knowledge, the actions which followed the closing of the transaction, and the ultimate distribution of funds form the basis for the waiver and estoppel defenses upon which the jury was properly instructed.

There was ample evidence to warrant the jury's consideration of the waiver and estoppel defense. Moreover, the Petitioner interposed no objection to the substance of the instruction or to the inclusion of the language concerning the Trustee's duty to inquire into matters about which he had knowledge.[2]

---

[2] The statement by Petitioner (Pet. p. 8) that any lack of diligence by the Trustee should not be imputed to a successor

As with the issues already discussed, there was also no objection at trial to the instruction on assignability, which was also pertinent under the facts of this case. The Petitioner's only objection on any of these points was that there could be no defense at all to an action under 11 U.S.C. § 363(n). No authority for such a startling proposition was offered to the District Court or the Court of Appeals, and Petitioner concedes here that there is none.

The absence of authority for Petitioner's argument, however, does not make the issue one of first impression. Trustees in bankruptcy have repeatedly been barred from recovery because of their own knowledge or conduct. *See, e.g., In re Davis*, 109 B.R. 633 (Bankr. D. Vt. 1989); *Ledford v. Second Nat'l Bank (In re Becker)*, 76 B.R. 108 (Bankr. S.D. Ohio 1986); and *Metsch v. Republic Nat'l Bank (In re Colombian Coffee Co., Inc.)*, 66 B.R. 211 (Bankr. S.D. Fla. 1986). In the first of those cases, summary judgment was granted against a trustee seeking turnover of property because of his knowledge of facts sufficient to put him on inquiry

---

trustee is nothing short of astounding and illustrates the difficulty of responding to Petitioner's scatter-shot brief. On the eve of trial, Petitioner tried to distance itself from the acts of the Trustee by converting the underlying bankruptcy case to a Chapter 11 case and substituting the debtor in possession for the Trustee as plaintiff at trial. Before permitting the substitution, the District Court obtained the absolute and unqualified agreement of counsel for Petitioner that the Petitioner and the Trustee were one and the same for the trial of this case. The trial record is replete with discussions of that point, and the Eighth Circuit specifically quoted part of it in rejecting Petitioner's attempt to back up on that agreement. (Pet. p. 19A.) For Petitioner to again claim a distinction between it and the Trustee in this case is unseemly at best.

and charging him with actual notice of the facts which existed. *See also United States v. Smith (In re Hagendorfer)*, 803 F.2d 647 (11th Cir. 1986).

The cases cited by Petitioner as allegedly establishing conflict between circuits are wholly inapposite. *Gumport v. China Int'l Trust & Inv. Corp. (In re Intermagnetics America, Inc.)*, 926 F.2d 912 (9th Cir. 1991), simply involved a debtor in possession (equivalent to a trustee) who was himself an active party to a conspiracy to defraud the estate. There he kept secret a $16,000,000 offer from a third party, formed a dummy corporation to buy the property for $6,000,000, and gave the ultimate buyer a five percent discount on its price not to bid. Obviously, the debtor could not argue that he was insulated from his own wrongdoing, and estoppel was not even an issue in the case.

No more helpful to Petitioner, but actually supportive of the position of Respondents, is *Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.)*, 3 F.3d 306 (9th Cir. 1993). After one bidder there offered $600,000 for the product, the other offered "102%" of that bid ($612,000), and the trustee rejected both. Then, to the knowledge of the trustee, those two bidders combined and offered $364,000 for the same product, which the trustee accepted. Thus, the trustee received forty percent less than the earlier bid due to the combination, and he sued alleging violations of Section 363(n) and the Sherman Act.

In the original opinion cited by Petitioner, the Ninth Circuit refused to permit the Section 363(n) claim to be pursued because it was not filed within one year as required by Fed. R. Civ. P. Rule 60. It did, however, allow the Sherman Act claims to proceed, while it expressly

reserved ruling on the appellees' available affirmative defenses, *Robertson*, 3 F.3d at 311, which in view of that trustee's knowledge would obviously include estoppel. The ruling did not, therefore, indicate exemption of the trustee from that defense, but rather determined that it ***was*** available.

Upon rehearing, the Court of Appeals withdrew its earlier opinion and held that the Trustee's Sherman Act claims were barred by *res judicata*. *Robertson v. Isomedix, Inc.*, 28 F.3d 965 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 577 (1994). Thus, both the Section 363(n) and antitrust claims were dismissed. While the court did not find it necessary to opine again on the issue of available affirmative defenses, the rationale employed in its original opinion was not abandoned in its supplemental opinion and is presumably still sound today.

Petitioner's argument is that by enacting subsection (n) of Section 363 of the Bankruptcy Code relating to sales of property by trustees, Congress intended to abolish all defenses which might otherwise exist under applicable law. Acceptance of such a proposition would contravene well settled principles of statutory construction expressed by this Court. As recently as 1993, this Court stated:

> Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.

* * *

> In order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law.

United States v. Texas, 113 S. Ct. 1631, 1634 (1993).

Similarly, the Court stated in *Astoria Federal Savings and Loan Association v. Solimino*, 501 U.S. 104, 108 (1991):

> The presumption holds nonetheless, for Congress is understood to legislate against a background of common-law adjudicatory principles. (citations omitted). Thus, where a common-law principle is well established . . . (citations omitted) the courts may take it as given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident." (citation omitted).

This sound principle has been specifically applied in connection with bankruptcy legislation. In *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994), this Court declined to find a Congressional intent to interfere with traditional law without a "clear and manifest" purpose to do so, "[o]therwise, the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law." (citations omitted). One of the authorities there cited was the statement of Mr. Justice Frankfurter, concurring in *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 171 (1946): "Bankruptcy legislation is superimposed upon rights and obligations created by the laws of the States."

Petitioner has the burden of demonstrating a clear Congressional purpose to exempt trustees from the consequences of their own knowledge and conduct, and it

has wholly failed to do so. The entire scheme of the Bankruptcy Code embodies the principle that a bankruptcy trustee "is not to have *carte blanche* to ignore nonbankruptcy law." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 244 (1989), (quoting *Midlantic, infra*). As stated by this Court in rejecting a similar argument to that here presented:

> If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt."

Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 501 (1986).

II. Election of Remedies is not an Issue.

Petitioner either totally misses the point or dissembles in stating that the Eighth Circuit ruling below requires a trustee to elect at the time of filing suit whether to set aside the sale or sue for damages. (Pet. p. 7.) Neither the Eighth Circuit nor the District Court required any such thing.

In response to Petitioner's argument that the District Court abused its discretion in refusing to permit it to amend its 1989 damage complaint to assert the alternative remedy of avoidance more than three years later, the Eighth Circuit stated:

> We need not reach that question, however, because the jury's verdict in favor of the defendants, which we uphold in Part VI, makes that issue moot. (Pet. p. 13A.)

Petitioner refuses to come to grips with the fact that the jury found against it on the issue of liability. That being the case, it matters not what remedy Petitioner wished to seek. It lost the case on liability and, consequently, its entire discussion of the nature of its relief if it had won is totally academic. Such matters are insufficient to warrant the grant of certiorari. As stated by Mr. Justice Frankfurter in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (citations omitted). "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

In any event, the attempted amendment was properly denied. Three months after becoming aware of the agreement of which Petitioner complains, the Trustee sued for damages based on the alleged difference between the sale price and the fair market value of the property at the time of the sale. Less than eight months later, the Trustee moved to distribute the bulk of the net sale proceeds received from Whisenhunt.

The first mortgage had been paid as part of the closing, and on January 8, 1990, the Trustee sought permission to pay the claims of the general creditors, to pay legal fees, to pay the Internal Revenue Service (for which amount the two shareholders of Petitioner were personally liable), and to make partial distributions to those shareholders in the amount of $75,000 each. That total distribution would leave in the estate only slightly in excess of $280,000 from the $1.2 million paid for the property by Whisenhunt.

In response to Vogel's objection that the proposed distribution would prevent rescission of the sale to Whisenhunt, the Trustee stated that only he could seek such relief and, further:

> Trustee admits that if he makes distributions contemplated by the subject Motion, he will be unable to effectuate such recission, however, states that recission is not a possibility under the circumstances of this case.

The Trustee's motion was granted over the objection on March 9, 1990, and the distribution was made.

More than three years after filing the Complaint for damages and more than two years after admittedly rendering himself unable to rescind the sale, the Trustee moved to amend his Complaint. In the proposed amendment, he not only did seek to rescind the sale, but also proposed to add as new parties the mortgagee and tenants who had acquired interests in the property in the interim and to eject and dispossess them. The District Court quite properly rejected that inappropriate and

untimely attempt to escalate and unduly complicate the Trustee's existing straightforward suit for damages.

Contrary to Petitioner's representation here, nobody forced the Trustee to do anything. He voluntarily and for his own reasons made his election between inconsistent remedies. He could have been required to elect, *Grogan v. Garner*, 806 F.2d 829 (8th Cir. 1986), but was not. He sued only for money damages and that was his own election.

Furthermore, the Trustee specifically disclaimed any possibility of seeking to set aside the sale when he successfully pursued distribution of the sale proceeds to himself and the beneficial owners of Petitioner in 1990, expressly stating that such relief was "not a possibility under the circumstances of this case." As a consequence, he was barred by the principles of judicial estoppel from subsequently changing that position. As stated in *Davis v. Wakelee*, 156 U.S. 680, 689 (1895):

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

See also Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987); *Murray v. Silberstein*, 882 F.2d 61 (3d Cir. 1989); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 121 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993); *Harris Trust and Savings Bank v. E-II Holdings, Inc.*, 926 F.2d 636, 641 (7th Cir. 1991), *cert. denied*, 502 U.S. 866 (1991).

The District Court summed up its reasons for denying the amendment as follows:

> The Trustee elected the remedy of damages in the original complaint and seeks three years later to elect the alternative remedy of avoidance, admittedly to seek a better recovery in the action. However, plaintiff offers no reason why he waited three years to seek amendment to the complaint when he acknowledges that in the interim, the property was sold, leased, developed and mortgaged. Clearly the opposing parties to this action, and the parties sought to be added, would be prejudiced by the late amendment. Under the circumstances of this case, justice does not require leave of court to allow for the amendment. *See Foman v. Davis*, 371 U.S. 178 (1962). (Pet. p. 27A.)

That ruling was as far from an abuse of discretion as imaginable, even if the entire issue were not mooted by the jury verdict.

III. The Case was Properly Submitted to the Jury.

This portion of the petition is the most disingenuous of all. Recognizing that its real goal of seeking further review of the jury's verdict would not likely be accomplished by presenting that issue in a straightforward manner, Petitioner attempts to bring the issue through the back door by phrasing it in terms of Seventh Amendment jury trial principles. There is no such dispute in this case, as the Eighth Circuit appropriately observed.

When this case was filed in the bankruptcy court, Respondents demanded a jury trial. The bankruptcy

judge found that "a bona fide jury trial issue exists" and certified the case to District Court for trial. The District Judge found that the defendants were entitled to a trial by jury on the basis of this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). At no time during those proceedings, nor any time prior to the jury verdict against it, did Petitioner object to or question the notion of resolving the issues in this case with a jury. In fact, Petitioner made a conscious, tactical decision to agree to a jury trial in order to avoid the possibility of error. As the Eighth Circuit properly held:

> At the pretrial hearing before the district court Mr. Brown, counsel for Landscape, apparently acquiesced in a jury trial. He stated:
>
> > MR. BROWN: If I may? That is a serious issue, because the right to trial by jury – this is strictly a statutory cause of action under 363(n). The right to trial by jury is really kind of iffy. We went along with it just because it seemed like if we do a jury, we don't have error, and if we don't do one, we might have error.
>
> In other words, to avoid any issue of possible error if there were a bench trial Landscape "went along with" the jury trial. Such acquiescence must be deemed a waiver of any objection to the jury trial. (Pet. p. 15A.)

That conclusion is eminently correct, and applies equally to Petitioner's failure to object to the submission to the jury of the Respondents' defenses. (Pet. p. 14.) The only objection ever made to jury consideration of any defenses was that none were possible. That issue has already been fully addressed.

In any event, there is no issue of substance regarding Respondents' right to a jury trial in this case. Petitioner is clearly wrong in suggesting that only common law claims implicate the right to jury trial. Numerous decisions of this Court squarely hold directly to the contrary. *See, e.g., Curtis v. Loether*, 415 U.S. 189, 193-96 (1974):

> Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time.
>
> * * *
>
> Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.
>
> * * *
>
> As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here – actual and punitive damages – is the traditional form of relief offered in the courts of law.

Moreover, the claims here were not substantially different from those asserted in *Granfinanciera, supra,* where a trustee in bankruptcy sought money damages from an allegedly preferential transferee. The considerations there held to dictate a jury trial apply equally here.

Petitioner again tries to assert its avoidance theory as being inherently equitable. It has already been demonstrated that Petitioner does not ***have*** an avoidance remedy, but even if it did, that would not deprive Respondents of their right to trial by jury on the other issues in the case. As stated in *Tull v. United States*, 481 U.S. 412, 425 (1987):

> In such a situation, if a "legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact."

Neither can Petitioner be successful in seeking review of the jury verdict under the guise of claiming a conflict with decisions from other circuits due to the Eighth Circuit's standard of review. (Pet. p. 14.) There was no disputed issue of state law even involved in this case, and the Eighth Circuit certainly did not afford undue deference to the District Court's determination of any legal issue – state or federal. Even the principal decision relied upon by Petitioner in this regard readily recognized the deference to which jury verdicts are entitled. In *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 975 (Fed. Cir. 1995), the Court aptly observed:

> Factual findings made by the jury in arriving at its verdict are to be upheld unless the party moving for JMOL shows that (when the correct legal standard is applied) there is not substantial evidence to support a finding in favor of the nonmovant.

The Eighth Circuit clearly reached its own conclusion that:

> The principal factual issue the jury had to resolve was, in the language of the instruction, whether "the $1,200,000 sales price of the property was controlled by an agreement between the Defendants." Substantial evidence supports a jury verdict that it was not so controlled. (Pet. p. 20A.)

The fact that it agreed with the District Judge in this regard hardly means that the Court of Appeals abdicated its own responsibility.

CONCLUSION

Try as it may, Petitioner cannot put its square peg into any of the round holes constituting appropriate grounds for certiorari. In the final analysis its arguments are nothing more than disagreement with the jury verdict. This Court does not grant review to entertain such issues. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984). *See also, General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of [certiorari] would not be warranted merely to review the evidence or inferences drawn from it."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.")

Petitioner's claims were factually disputed, and the jury properly resolved all relevant issues. Petitioner has received appropriate judicial review at both the trial and

appellate court levels, and it is time to put an end to the ordeal of Respondents. The petition should be denied.

Respectfully submitted,

JOHN C. CALHOUN, JR., Esq.*
SCOTT E. DANIEL, Esq.
HILBURN, CALHOON, HARPER, PRUNISKI & CALHOUN, LTD.
P. O. Box 5551
North Little Rock, Arkansas 72119
(501) 372-0110

Attorneys for Respondent Robert A. Vogel

*Counsel of Record

G. PATRICK ARNOULT, ESQ.
RUSSELL J. HENSLEY, ESQ.
THE BOGATIN LAW FIRM
860 Ridge Lake Boulevard
Suite 360
Memphis, Tennessee 38120
(901) 767-1234

Attorneys for Respondent Joe D. Whisenhunt